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THE DETENTION OF PERSONS WITH PSYCHOLOGICAL DISABILITIES

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Sussex Law School Human Rights Law Clinic

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Introduction

Persons with disabilities, particularly persons with psychological disabilities (PPDs), are routinely deprived of their liberty and involuntarily detained in institutions all over the world. Whilst as a starting point there appears to be a general consensus that involuntary institutionalisation of PPDs is undesirable and should be avoided, divergence arises as to what stage, if any, this position can be deviated from. The key question is whether the institutionalisation of PPDs should always be a voluntary decision for such persons to make, or whether it can sometimes be legitimate to take that decision out of the hands of the individual concerned.

As will be explored in this memorandum, there are two schools of thought. The first is that a psychological disability should never justify a deprivation of liberty, primarily based upon the idea that PPDs are persons with full legal capacity on an equal basis with others and not objects to be paternalistically cared for. This position is enshrined in the Convention on the Rights of Persons with Disabilities (CRPD). The opposing position is that whilst PPDs should not generally be deprived of their liberty, it may sometimes be necessary to do so, primarily due to a desire to prevent harm being done to the individual or to others. This position is taken by the Human Rights Committee (Committee) within its General Comment 35 (GC35).[1]

Given this clear divergence of views, the key aim of this memorandum is to analyse the drafting process of the relevant documents in order to ascertain the rationale for each position. The validity of each position is analyzed, drawing from contributions made by States and non-governmental organizations (NGOs) throughout each drafting process, as well as academic literature. It is also pertinent to consider the implications of the diverging positions throughout, so as to determine potential consequences and the likelihood of implementation.

Drafting history of the CRPD and GC35

The prohibition against deprivation of liberty under the CRPD

The CRPD is clear that the detention of PPDs based on their disability is never legitimate, declaring in Article 14(1)(b) that 'the existence of a disability shall in no case justify a deprivation of liberty'. The CRPD was adopted and opened for signature by the General Assembly in December 2006.[2] This brought to a close a five year drafting process in which many discussions took place in order to determine what position the CRPD should take on a number of issues relating to persons with disabilities, including involuntary institutionalisation. It is these discussions which will first be analysed to ascertain the rationale for the adoption of this strict provision.

The process of negotiating the CRPD began in December 2001 when the General Assembly adopted Resolution 56/168 to establish an Ad Hoc Committee (AHC) on the adoption of a Convention to promote and protects the rights of persons with disabilities. At the second session of the AHC, it was decided that a Working Group (WG) would be established with the aim of preparing and presenting a draft text of the proposed Convention, which would form the basis for discussion and negotiation for States and interested organisations.[3]

[1] United Nations Human Rights Committee, 'General Comment 35', UN Doc CCPR/C/GC/35 (2014), para 19.
[2] UN General Assembly, 'Convention on the Rights of Persons with Disabilities' (1 December 2006) UN Doc A/AC.265/2006/L.8/Rev.1
[3] UN General Assembly, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', UN Doc A/58/118 & Corr.1 (2003).

Disability as the basis or sole basis of deprivation of liberty?

In relation to involuntary institutionalisation, Article 10 of the WG draft asserted that:

> 'State Parties shall ensure that persons with disabilities… are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty shall be in conformity with the law, and in no case shall be based on disability'.[4]

At the subsequent sessions of the AHC, discussion commenced on the draft text whereby comments were made and amendments were proposed. One of the key suggestions, proposed by Canada and supported by other States, which persisted throughout the drafting process, was to amend the WG text so that it read 'and in no case shall be based *solely* on disability'.[5] The effect of this amendment would have been to weaken the protection provided for in the provision as it would have meant that cases whereby persons with disabilities were deprived of their liberty due to a combination of their disability and another factor, such as protection from harm, would not be prohibited. States such as Japan, Uganda and Norway also advocated for this qualified approach, arguing that there are circumstances in which persons with disabilities may need to be involuntarily institutionalised, particularly due to the risk of harm being done to themselves or others.[6]

Many other States voiced their disapproval of this kind of amendment. For instance, both Mexico and Jamaica were concerned that this would be liable to misinterpretation, whilst Thailand and Kenya opposed on the basis that it would in reality still allow for disability to be *the* basis for a deprivation of liberty, providing that it was used in conjunction with another factor.[7] Similarly, several NGOs expressed concern with the approach suggested by Canada. The World Network of Users and Survivors of Psychiatry argued that this would open the door for States to institutionalise persons with disabilities for being a danger to society, which would be discriminatory as the non-disabled are not subject to the same standard.[8] People With Disability Australia opposed the amendment on the basis that it would create a loophole allowing States to deprive persons with disability of their liberty.[9] The International Disability Caucus expressed disapproval in strong terms, rhetorically asking whether a similar provision which replaced the term 'disability' with 'race' would be acceptable, or whether it would suggest that race is a permissible ground for detention.[10]

At the fifth session, Australia suggested a compromise to this disagreement, i.e. that the wording be changed to read, 'the existence of a disability shall not of itself be a sufficient reason to justify the deprivation of liberty'.[11] However, Yemen expressed concern with the term 'of itself', whilst Thailand disapproved of the word 'sufficient', arguing that it raised similar problems as before by suggesting that disability can form the basis for a deprivation of liberty if in conjunction with another consideration.[12] As a result, both of these terms were removed, and the agreed upon wording at the conclusion of the fifth session was 'the existence of a disability shall not justify the deprivation of liberty'.

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[4] UN General Assembly, 'Report of the Working Group to the Ad Hoc Committee', UN Doc A/AC.265/2004/WG/1 (2004).
[5] UN General Assembly, 'Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities', Daily Summary of Discussions Related to Article 10: Liberty and Security of the Person (26 May 2004) available at <www.un.org/esa/socdev/enable/rights/ahc3sum10.htm> (accessed 21 March 2017).
[6] UN General Assembly, 'Fifth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', Daily Summary of Discussion at the Fifth Session (26 January 2005) available at <www.un.org/esa/socdev/enable/rights/ahc5sum26jan.htm> (accessed 21 March 2017).
[7] Ibid
[8] UNGA, above note 5.
[9] UNGA, above note 6.
[10] Ibid.
[11] UNGA, above note 6
[12] Ibid.

It is correct that attempts to make these amendments were resisted as to do otherwise would allow States to justify the deprivation of liberty of persons with disabilities on the basis of another factor, invariably the likelihood of harm, even where it is clear that the real basis is the existence of a disability itself. Furthermore, even if the reason for institutionalisation was the potential for harm, this would still be discriminatory as it is not applied in the same manner to those without disabilities, and thus cannot be delinked from the disability. Thus, to include this amendment would be to render this provision essentially meaningless.

Exceptional circumstances for deprivation of liberty?

At various stages of the drafting process attempts were also made to state that, whilst involuntary institutionalisation is illegal, it may be allowed in exceptional circumstances. This was initially put forward by Ireland[13] and subsequently supported by Chile.[14] More surprisingly this was also expressly supported by an NGO, Persons With Disabilities Australia.[15] Conversely, Inclusion International proposed a change to the text to make clear that no law could force people to live in institutions, arguing that institutionalisation is very destructive to those with disabilities and leads to their dehumanisation, as well as that of the staff, which makes abuse inevitable.[16] Inclusion International disagreed with those that had advocated that institutions offer quality care at an affordable price, asserting that they are nothing more than a costly form of segregation.[17] To add to these points, amending the provisions in this way would be dangerous as the term 'exceptional circumstances', with no further clarification, is incredibly vague and is susceptible to abuse by States who could claim exceptional circumstances without justification.

Final text

At the seventh session the Chairman of the AHC drafted a new text taking into account the comments and proposed amendments that had been made in the previous sessions. In regards to the liberty and security of the person, which was now contained in Article 14, the final wording read as follows:

> 'States Parties shall ensure that persons with disabilities, on an equal basis with others… are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and in no case shall the existence of a disability justify a deprivation of liberty'.[18]

At the eighth and final session, the proposed text was finalised and submitted to the General Assembly, which duly adopted it to make the CRPD open for signature.[19]

The position ultimately adopted demonstrates a robust approach to the liberty of persons with disabilities, imposing a clear prohibition on involuntary institutionalisation. The approach generally endorsed the compromise initially proposed by Australia, but also resisted inserting a qualifier such as 'solely' which, as discussed above, would have caused significant problems. Continuing the strong position on this issue, there was no allowance for institutionalisation in 'exceptional circumstances' as advocated by some. The fact that the

[13] UNGA, above note 5.
[14] UN General Assembly, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Fourth Session', Daily summary of discussions related to Article 10: Liberty and Security of the Person (26 August 2004) available at <www.un.org/esa/socdev/enable/rights/ahc4sumart10.htm> (accessed 21 March 2017).
[15] UNGA, 'Seventh Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', Daily Summary of Discussion at the Seventh Session (19 January 2006) available at <www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm> (accessed 21 March 2017).
[16] UNGA, above note 5.
[17] Ibid.
[18] UNGA, above note 15.
[19] UNGA, above note 2.

formulation of Article 14 did not significantly change throughout the drafting process, at least in substantive terms, indicates a clear intention by the drafters of the CRPD to create a document which respects the autonomy and dignity of those with disabilities. This is even more apparent when examining other provisions of the CRPD, such as the general principles under Article 3(a), which include the decision to make one's own choices, as well as Article 12, which requires that persons with disabilities have equal recognition before the law, and enjoy legal capacity on the same basis as others. The inclusion of important provisions such as these emphasises a clear desire to treat those with disabilities as full persons before the law rather than objects to be cared for, which accounts for the clear rejection of any proposal to allow for involuntary institutionalisation or any other kind of paternalistic deprivation of liberty which is made without the consent of the individual involved. As will now be explored, the Committee demonstrated no such desire in the formation of GC35.

A qualified approach under GC35

The Human Rights Committee expressed the view in paragraph 19 of GC35 that, whilst involuntary hospitalisation can cause harm, and whilst States should provide less restrictive alternatives including adequate community-based or social-care services, it may sometimes be necessary and proportionate to deprive PPDs of their liberty in order to prevent serious harm being committed against themselves or others.[20] At the heart of paragraph 19 of GC35 is the Committee's position that:

> "The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others".

Having said this, GC35 does go on to list a number of safeguards and limitations on deprivation of liberty based upon disability.[21] These include that such detention must be a measure of last resort and for the shortest amount of time, that the views of the individual should be respected, that any representative should genuinely represent and defend the individual's wishes and interests, and that the detention must be re-evaluated at appropriate intervals.

Nevertheless, the position in GC35 is in direct contradiction to the position adopted in Article 14(1)(b) of CRPD which implements an outright prohibition on the deprivation of liberty on the grounds of disability. Given the clear divergence from the position of the CRPD which was adopted some years prior, it is pertinent to analyse the discussions during the drafting process of GC35 in order to understand the rationale.

Half day of general discussion

The process began at the 105th session of the Committee whereby it adopted a note stipulating that there would be a half-day of discussion in preparation for a new General Comment on Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to be held at the 106th session.[22] This note set out the issues which it was expected to be addressed, although this focussed largely on definitions and explanations of the language of Article 9 ICCPR and less so on specific forms of detention such as that based on disability.

At the 106th session the general discussion was held and interested organisations had the opportunity to draw the Committee's attention to relevant issues that should be considered and addressed in the General Comment in regards to liberty and security of person, including in relation to the detention of persons with disabilities. In this regard, the Castan

[20] General Comment 35, op cit, para 19.
[21] Ibid.
[22] Human Rights Committee, 'Issues for Consideration During the Half-day General Discussion in Preparation for a General Comment on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 105th session', UN Doc CCPR/C/105/3 (2012).

Centre called for the Committee to clarify the parameters within which involuntary detention for psychiatric purposes is permitted under Article 9 ICCPR.[23] The Committee did so, although perhaps it did not endorse a position that many NGOs had hoped. For instance, Amnesty International noted that the Working Group on Arbitrary Detention (WGAD) had considered a deprivation of liberty to be arbitrary, and therefore in violation of Article 9 ICCPR, when it violates international laws prohibiting discrimination, including on the basis of disability.[24]

Likewise, the Mental Disability Advocacy Center (MDAC) requested that the General Comment be in line with the provisions of the CRPD as the most authoritative international instrument on the rights of persons with disabilities,[25] and should specifically note that depriving someone of their liberty on the basis of liberty is against the CRPD.[26] The Committee clearly did not heed this advice. One of the reasons that MDAC advocated for this position was due to the 'well documented' risk of torture and ill-treatment in institutions, often taking place with impunity.[27] MDAC therefore recommended that the Committee should note this danger in its General Comment.[28] Again, the Committee did not follow this recommendation, although it did acknowledge the harm that may result from involuntary hospitalisation.[29] As a means to alleviate this harm, MDAC also recommended that the General Comment highlight the need for independent monitoring of institutions,[30] which again was not taken up by the Committee.

Similarly, the International Disability Alliance (IDA), made up of a number of different NGOs, wished to highlight the importance of the CRPD, particularly that no person can be subject to discriminatory detention based on disability, even if predicated on arguments such as the need for care or the need to prevent harm, as these arguments are in reality only made to justify detention of those with disabilities, and are thus discriminatory.[31] Allowing this kind of detention, IDA argued, is stereotyped profiling that treats all PPDs as second-class members of society.[32] Like MDAC, IDA also highlighted the significant harm caused by detention, which is ironic given the fact that it is presented as a means to promote mental health.[33] IDA also drew attention to the recognition of legal capacity of those with disabilities within the CRPD,[34] as seen above, which is not respected by any provision allowing for involuntary institutionalisation.

Human Rights Watch (HRW) also provided a written submission, although it did not take a clear position on the deprivation of liberty of those with disabilities. At this stage HRW merely recommended that the Committee take note of the CRPD provisions on the right to liberty and legal capacity, and urge States to comply.[35]

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[23] Human Rights Committee, 'General Discussion on the Preparation for a General Comment on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights', 106th session (25 October 2012) written contribution by Castan Centre for Human Right Law, 4, available at <www.ohchr.org/EN/HRBodies/CCPR/Pages/GConArticle9WrittenContributions.aspx> (accessed 22 March 2017).
[24] Ibid, written contribution by Amnesty International, 7.
[25] Ibid, written contribution by Mental Disability Advocacy Center, paras 5 and 6.
[26] Ibid, para 9.
[27] Ibid, para 14.
[28] Ibid, recommendation 4.
[29] General Comment 35, op cit, para 19.
[30] General Discussion at the 106th session, op cit, written contribution by Mental Disability Advocacy Center, recommendation 10.
[31] Ibid, written contribution by International Disability Alliance, 2.
[32] Ibid, 3.
[33] Ibid.
[34] Ibid, 4.
[35] Ibid, written contribution by Human Rights Watch, 3.

Draft text of GC35

After taking contributions from interested NGOs, the Committee's rapporteurs responsible for leading on the development of GC35 formulated a first draft and began its first reading at its 107th session.[36] The first reading was concluded at the 110th session, at which point the Committee called for comments from all interested stakeholders. Once again many NGOs contributed to these discussions, but at this time several States also made submissions. Attention will now be turned to examining all those contributions which made reference to the deprivation of liberty of those with disabilities.

The first draft of GC35, much like the final version, permitted institutionalisation on the grounds of prevention of harm to the individual or others,[37] and as such was met with widespread disapproval by NGOs, many of which were disappointed that the Committee had not followed the direction of the CRPD. To this end, one joint statement by various disability NGOs argued that the CRPD shifts the paradigm from patient to full personhood, and as such rejects the protectionist approach of imposing a duty to act against the will of PPDs for their purported best interests which is an obstacle to full and equal enjoyment of human rights,[38] an approach which the Committee endorsed in this draft. This submission was also critical of the Committee for not having inquired into the interpretation of the CRPD by the Committee on the Rights of Persons with Disabilities (CmRPD) or other UN experts.[39] Indeed, according to the CmRPD and others, mental health detention is in violation of the CRPD.[40]

Another joint statement of organisations and experts urged the Committee to abandon its position that mental health detention is acceptable and adopt what is described as the emerging norm which prohibits this, as elaborated under the CRPD.[41] Like the joint statement before it, this one referred to the work of the CmRPD which interpreted the CRPD to impose an obligation on States to repeal laws which authorise the detention of PPDs.[42] Autistic Minority International (AMI) was also critical of the Committee diverging from the approach of the CRPD, arguing that most States parties to the CRPD are also parties to the ICCPR, and they clearly recognise that time has moved on in regards to mental health detention, and thus committed to follow stricter rules than those called for by the Committee.[43]

The Special Rapporteur on disability also weighed in, expressing concern that the first draft of GC35 failed to uphold the rights of those with disabilities equally with others, and could be seen to legitimise acts of torture and cruel, inhuman or degrading treatment.[44]

Many of these contributors felt it inappropriate for the Committee to deviate from the CRPD given that it was considered the authoritative instrument on the rights of persons with disabilities.[45] As a result of this deep criticism, some NGOs called for amendments to be made to paragraph 19, whilst others called for its complete removal. AMI was one such voice, giving perhaps the most scathing criticism of the draft. It argued that the approach of the Committee hinders implementation of the CRPD provisions rather than advancing human rights standards, further adding that if the Committee does not wish to align itself with

[36] Human Rights Committee, 'Draft General Comment No. 35', UN Doc CCPR/C/107/R.3 (2013).
[37] Ibid, para 19.
[38] UNHRC, 'Draft General Comment Article 9 - Call for Comments' 110th session (10 March 2014) written contribution to Human Rights Committee on its Draft General Comment No. 35, from the perspective of persons with disabilities, 1, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx> (accessed 22 March 2017).
[39] Ibid.
[40] Ibid, 2.
[41] Ibid, 1.
[42] Ibid.
[43] Ibid, written contribution by Autistic Minority International, 2.
[44] Ibid, written contribution by the UN Special Rapporteur on Disability, 1.
[45] See for example; ibid, 1; and UNHRC, above note 38.

the approach of the CRPD, it would be preferable that it kept quiet on the issue of detention of PPDs going forward.[46]

State interventions

As mentioned previously, it was not just NGOs that commented on the issue of detention of those with disabilities, some States also made contributions on the issue at this stage. Australia was largely in support of the views expressed by NGOs, suggesting that the language used in paragraph 19 of the draft GC35 should reflect that used by the CRPD and its treaty body.[47] Conversely, Ireland suggested that the Committee might consider whether protecting the individual from harm should include harm that is likely to result when the person does not receive appropriate treatment, as under Irish law.[48] This would essentially have operated as an expansion on the position of the draft GC35, as it would allow for an extra justification for the detention of PPDs. Finally, the US did not agree with the approach of the Committee in requiring that detention be necessary and proportionate, arguing that this is not the correct standard for judging arbitrariness under Article 9 ICCPR.[49] The US argued that nothing within the text or travaux of Article 9 required detention to be necessary to achieve a legitimate aim, or somehow proportionate.[50]

Final text

Despite robust criticism of approach of the Committee at various stages of the drafting of GC35, it is clear that the Committee largely disregarded the concerns raised by NGOs, the UN Special Rapporteur on disability, and some States as there was little substantive change to the language of paragraph 19. This is not dissimilar to the CRPD in this way, although as has been seen there was not nearly as much consensus between those parties involved in the drafting of the CRPD as there was between the contributors to the formulation of GC35. Regardless, the Committee seemed intent on adopting an approach that allows for depriving those with disabilities of their liberty, irrespective of condemnation by interested parties. As many of the discussions during the drafting process were held behind closed doors, the motivation for this intention are not easily ascertained. Nevertheless, given that quite diverging positions were adopted in the CRPD and GC35, arguments in favour of each will now be explored in order to examine their validity.

Assessing the positions

<u>In favour of a prohibition on institutionalisation</u>

One of the major arguments against institutionalisation is that involuntarily detaining someone who has not committed a crime is unacceptable as it runs counter to the idea that all persons enjoy legal capacity, and must be recognised before the law. Indeed, the CRPD makes clear in Article 12 that this universal principle applies equally to those with disabilities. In reality, the discourse on legal personhood has been tied into cognition and rationality, thus the legal capacity of those with disabilities has often not been recognised.[51] They have historically been seen as not worthy of legal capacity, and instead as a group which must be paternalistically protected, thus becoming objects rather than legal subjects.[52] However, the CRPD has spurred an emerging consensus that all persons should enjoy legal capacity

[46] UNHRC, above note 38, written contribution by Autistic Minority International, 3.
[47] Ibid, written contribution by the Government of Australia, para 31.
[48] Ibid, written contribution by the Government of Ireland, para 2.
[49] Ibid, written contribution by the Government of the USA, para 35.
[50] Ibid, para 31.
[51] Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81, 82.
[52] Ibid, 85.

equally, regardless of decision-making capabilities.[53] There is a difference between decision-making abilities and legal capacity, and there is a convincing argument that even though all have varying degrees of the former, this should not have an impact on the latter.[54] This is particularly important as legal capacity is the backbone of a plethora of other rights, as those who are not seen as a person before the law cannot access their other human rights.[55]

Whilst the idea that all persons enjoy legal capacity is indeed a strong argument against a system of involuntary institutionalisation which fails to recognise this and acts against the will of the individual, the fact remains that there are some people who are incapable of making decisions on their own. Hendriks acknowledges the benefit in the approach of the CRPD in recognising that persons with disabilities are not objects of care but autonomous beings with dignity, entitled to make their own decisions, but warns that these aspirations do not always correspond with reality.[56] It is questionable whether the CRPD pays enough attention to the fact that not everyone can freely determine their own will and actions.[57] For Hendriks it is the duty of a civilised society to guarantee the dignity of those people, and calls for independence should not be a pretext to deny all kinds of care and support services.[58] However, a desire to respect the legal capacity of those with disabilities is not to prevent them access to care and support, but merely to acknowledge that it must be consensual and not against their will, thus using the same standard that applies to those without disabilities. Whilst extreme cases exist, and under these circumstances it will sometimes be necessary to make decisions on behalf of an individual, it is important to remember that this will constitute only a small number of cases and should not form the entire basis for care and support,[59] but rather the system should be based upon the will of the individual as a starting point. A system which imposes involuntary institutionalisation does not conform to such a model.

Another argument in favour of a prohibition on the detention of persons with disabilities is that it is discriminatory, as the justifications put forward for it, namely to prevent harm being caused, are not equally applied to all. This runs counter to Article 2 of the Universal Declaration of Human Rights, which prohibits discrimination of any kind in the access to human rights.[60] Bartlett notes that a common argument within this debate is that we do not intervene when people without disabilities are dangerous, so why should we for those with disabilities?[61] This argument illustrates that permitting involuntary institutionalisation is discriminatory as it does not apply equally to all considered likely to cause harm. Slobogin argues that a system which permitted the detention of anyone considered dangerous prior to criminal conduct would be a clear violation of international law.[62] This is because it would not show respect for human autonomy and dignity, in which case it has to be asked why the autonomy and dignity of those with disabilities is not respected in the same manner?

Lastly, the justification for depriving those with disabilities of their liberty such as within GC35, must be addressed. The justification is that it is sometimes necessary in order to prevent harm being caused to the individual or to others. However, the idea that persons with disabilities can be deprived of their liberty in order to protect them from harm is not

[53] Ibid, 82.
[54] Ibid, 83.
[55] Ibid, 87.
[56] Aart Hendriks, 'Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities' (2007) 14 *European Journal of Health Law* 273, 278.
[57] Ibid.
[58] Ibid, 279.
[59] Flynn, op cit, 98.
[60] Universal Declaration of Human Rights, adopted under GA Res 217 A(III) (1948), Article 2.
[61] Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and the Future of Mental Health Law' (2009) 8 *Psychiatry* 496.
[62] Christopher Slobogin, 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36, 39.

convincing when one considers that institutionalisation can itself cause great harm, as highlighted by many contributors to the drafting of GC35. For example, MDAC noted that it is well documented that placing someone in an institution increases the risk of abuse, ill-treatment or even torture.[63] Even the Special Rapporteur on torture has acknowledged this.[64] For IDA, it is ironic that detention is predicated on the basis of promoting mental health given these well established harmful effects.[65] Indeed, the risk of harm associated with institutionalisation was even acknowledged within GC35,[66] but evidently this was not a significant enough consideration to result in a change of approach. Furthermore, the basis for the justification is called into question by studies that show that those with disabilities are no more likely to cause harm than anyone else.[67] For these reasons it is hard to argue that the reasons put forward to justify institutionalisation are legitimate.

In favour of the possibility of institutionalisation

As has been addressed, the major justification for permitting involuntary institutionalisation of those with disabilities is that it is sometimes necessary in order to prevent the individual causing harm to themselves or others. Indeed, this is the only permissible basis to deprive someone with a disability of their liberty according to GC35.[68] It seems to be a generally accepted notion that those with disabilities have more potential to cause harm. For instance, the WGAD advocated for the position that PPDs require special attention due to their 'vulnerability', and in some cases special attention will need to take the form of confinement in institutions in order to prevent harm.[69] The WGAD went on to say that a mental illness may render it inevitable to take measures including deprivation of liberty in the interest of the individual, or society as whole.[70] Putting aside the issue that this stance clearly conflicts with the principles of human autonomy and that all persons enjoy legal capacity, another problem is that this argument is largely lacking in any statistical evidence, instead it is based upon perception and belief.

A second argument in favour of the possibility of institutionalisation is that an outright prohibition would result in States being more prone to detain PPDs who commit crimes subsequent to conviction, the assumption being that the conditions within institutions are more favourable than prisons. However, there are two issues with this argument. The first is that disability advocates wish for those with disabilities to be recognised before the law on an equal basis with others and in a non-discriminatory manner, as provided for within the CRPD.[71] This principle means that those with disabilities are also subject to the criminal law equally,[72] and thus the same consequences apply. The second point to be made in relation to this argument is that whilst the assumption is that PPDs who commit crimes are better off in institutions than prisons, the reality is that the former are not a less harsh alternative.[73] Indeed, as has been explored above, several NGOs as well as and the Special Rapporteur on torture have acknowledged that institutionalisation inflicts severe suffering, even amounting to torture. Thus it is hard to contend that institutionalisation should be permitted as an alternative to PPDs being detained in prisons, particularly when one considers that the only legal basis for holding someone in a prison is due to the committal of a crime, whilst PPDs are held in institutions for other reasons.

[63] UNHRC, above note 23, written contribution by Mental Disability Advocacy Center, paras 14 and 15.
[64] Ibid, para 16.
[65] UNHRC, above note 23, written contribution by International Disability Alliance, 3.
[66] General Comment 35, op cit, para 19.
[67] UNHRC, above note 23, written contribution by International Disability Alliance, 3.
[68] General Comment 35, op cit, para 19.
[69] Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6 (2004), para 55.
[70] Ibid, para 57.
[71] Articles 5 and 12.
[72] UNHRC, above note 38, 1.
[73] Ibid.

The final argument in favour of involuntary institutionalisation to be considered is that an outright prohibition is practically unworkable due to the way the system in most States is currently set up. Prior to the CRPD, mental disability represented a lawful ground for a deprivation of liberty under international law.[74] For this reason, the vast majority of jurisdictions worldwide permit involuntary detention of PPDs.[75] To take the EU as one example, national legislation in all Member States requires the pretence of a mental health condition as one criteria for involuntary placement.[76] To this end, one study found that in 2007 there were 1.2 million people in psychiatric and social care institutions in the EU alone.[77] As such, endorsing the position in the CRPD would require the allocation of a huge number of resources to shift the current system, and it is therefore questionable whether there would be widespread support. For instance, psychiatric professionals will find this approach difficult to reconcile with their daily practice, and might disregard it as absurd.[78] The danger with this is that States may consider this provision of the CRPD to be unrealistic and thus not make any attempts to move towards this position. Of course, this is the difficulty with international human rights treaties, in that they are not binding in domestic courts and thus cannot be enforced. In particular, this creates a problem for European States as it is not possible to comply with both the CRPD Article 14 and ECHR Article 5(e),[79] which lists 'unsound mind' as a justifiable limitation on the right to liberty. In the context of European States, it is more likely that they will follow the approach of the ECHR, which is binding, as opposed to the CRPD, which is not.

Conclusion

As has been explored, there is clear divergence as to whether it can be legitimate to take an issue of institutionalisation out of the hands of an individual with a disability, and involuntarily deprive them of their liberty based on their disability. In regards to the CRPD there is a clear intention to show respect for legal capacity and human autonomy by prohibiting involuntary institutionalisation on the basis of disability, as demonstrated by the rejection of attempts to introduce qualifiers such as 'solely' to Article 14. Conversely, GC35 legitimises the detention of PPDs despite clear opposition from NGOs and other stakeholders, and in direct contrast to the CRPD, although as seen, this position is in line with international law prior to the introduction of the CRPD. It is possible that this is in part due to pressure on the Committee in discussions behind closed doors. Those who advocate for the position in GC35 generally do so on the basis that PPDs carry a potential to cause harm to themselves or to others, but as discussed, far from being protected from harm, the individual is likely to suffer significant harm in an institution, and whether PPDs are statistically more likely to cause harm to others is questionable. In principle it is clear that a respect for legal capacity and human autonomy of *all* persons, as spurred by the CRPD, in addition to the dubious legitimacy and discriminatory nature of the justifications for institutionalisation, mean that it is difficult to advocate for depriving PPDs of their liberty involuntarily. In reality, it seems that the position within the GC35 is based on practicality given that most States allow for some form of detention of PPDs. For this reason it might be argued that it is unrealistic to expect States to conform to CRPD Article 14. However, whilst a dramatic short-term overhaul is unlikely to be achievable, there is no reason why the position within the CRPD could not and should not be progressively realised, particularly as it is considered to be authoritative guidance on the rights of persons with disabilities.

[74] Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, UN Doc A/HRC/10/48 (2009), para 48.
[75] Flynn, op cit, 85.
[76] UNHRC, above note 23, written contribution by the European Union Agency for Fundamental Rights, 1.
[77] UN Office of the High Commissioner for Human Rights, Europe Regional Office, 'Forgotten Europeans, Forgotten Rights: The Human Rights of Persons Placed in Institutions' (2007), 6.
[78] Bartlett, op cit, 498.
[79] UK Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017), 247.